

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**Petition by National Railroad Passenger
Corporation for Relief Pursuant to
49 U.S.C. § 24095**

STB Finance Docket No. 36048

**PETITION TO HOLD PROCEEDING IN ABEYANCE
PENDING PARALLEL DISTRICT COURT LITIGATION**

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INTRODUCTION

The Massachusetts Bay Transportation Authority (“MBTA”) respectfully requests that the Surface Transportation Board (“Board”) hold this proceeding in abeyance, and stay all further proceedings or other actions in this matter, pending the resolution of a related, first-filed district court action, *Massachusetts Bay Transportation Authority v. National Railroad Passenger Corp.*, No. 16-10120 (D. Mass.) (the “District Court Litigation”).¹ The reason for this request is simple. The District Court Litigation challenges the constitutionality of the very statutory provision under which petitioner National Railroad Passenger Corp. (“Amtrak”) seeks relief in this action, 49 U.S.C. § 24905. If the District Court Litigation is decided in MBTA’s favor, it will entirely moot this proceeding and vitiate any relief the Board may have granted Amtrak in the meantime. There are strong reasons to believe that will happen, not least of which is the D.C. Circuit’s recent decision to strike down a statutory provision very similar to § 24905 (involving the freight railroads) on two independent constitutional grounds that MBTA also raises in its complaint. *See Ass’n of Amer. R.R. v. Dept. of Transp.*, 821 F.3d 19 (D.C. Cir. 2016) (“AAR”). The Board repeatedly has explained that it will hold cases in abeyance when there is federal court litigation that could obviate the Board’s proceedings, particularly when that litigation concerns constitutional issues that the Board will not itself adjudicate. Waiting for a decision in the District Court Litigation thus strongly serves the important interest in conserving the resources of this agency and the parties (as well as the taxpayers who support each of them), wherefore this petition should be granted.²

¹ The Complaint in the District Court Litigation is submitted herewith as Exhibit A.

² Before filing this petition, MBTA asked Amtrak to assent to an abeyance pending the District Court Litigation. Amtrak declined to do so.

BACKGROUND

This action arises from Amtrak’s petition to the Board for an order allocating costs borne by MBTA and Amtrak for facilities and services along a section of the Northeast Corridor in Massachusetts (the “Attleboro Line”) owned by MBTA and accessed by Amtrak under an existing contractual agreement with MBTA. Amtrak relies for its petition on a provision of the Passenger Rail Investment and Improvement Act of 2008 (“PRIIA”), Pub. L. No. 110-432, Div. B, 122 Stat. 4848, 4907 (2008) (codified as amended in various sections of Title 49 of the U.S. Code). As subsequently amended, PRIIA purports to terminate existing contracts between Amtrak and state commuter rail authorities such as MBTA and directs the parties to enter new cost-sharing agreements based on a formula (the “Cost Sharing Policy”) developed by the Northeast Corridor Commission (the “Commission”) created by PRIIA. *See* 49 U.S.C. § 24905(c)(2).³ If the parties fail to reach a new agreement implementing the Commission’s Cost Sharing Policy, the Board is directed to determine the appropriate level of compensation under the Policy. *Id.*

Several months before Amtrak filed its petition with the Board, MBTA filed its complaint in the District Court Litigation, alleging (*inter alia*) that § 24905 is unconstitutional and the Cost Sharing Policy is invalid. If the District Court agrees with MBTA in its challenge, it would eliminate the sole legal basis for Amtrak’s petition and moot this action.

I. MBTA and its Relationship with Amtrak.

MBTA operates most bus, subway, commuter rail, and ferry routes in the greater Boston region. Within the States making up the Northeast Corridor—an amalgamation of rail lines that run from Boston through New York City, Philadelphia, and Baltimore to Washington, D.C.—

³ Prior to a recent statutory amendment, the Commission was known as the Northeast Corridor Infrastructure and Operations Advisory Commission.

state commuter rail agencies such as MBTA provide “short haul” rail service to hundreds of thousands of passengers daily. Amtrak provides long-distance passenger service between major metropolitan areas on the Northeast Corridor, typically sharing the rail lines with the state commuter rail agencies.

In most States on the Northeast Corridor, Amtrak owns the rail line and provides state commuter rail agencies with access to that line for the States’ commuter rail service. By contrast, in Massachusetts, Amtrak operates on but does not own the Attleboro Line; since 1973, that line has been owned by MBTA.⁴ MBTA’s ownership of its rail lines is an extremely valuable asset, representing a considerable historical and ongoing investment by the taxpayers of Massachusetts.

Amtrak and state commuter rail agencies have traditionally negotiated bilateral agreements governing topics such as access to each other’s rail assets, maintenance performed on rail lines, and station operations. MBTA and Amtrak entered into such an agreement, referred to as the Attleboro Line Agreement (“Agreement”), on July 1, 2003. The Agreement has a term of thirty years and (except for specified causes) is terminable by either party for convenience on provision of 12 months’ notice. *Id.* §§ 10, 23.2. Under the Agreement, MBTA provides Amtrak the right to use the Attleboro Line, as well as dispatch rights—including the ability to determine priority of dispatch between trains—which the parties expressly stated they “both . . . value highly.” *See* Agreement at 1 and § 2.1. In exchange, Amtrak provides MBTA with specified dispatch and maintenance services on the Attleboro Line. *Id.* §§ 2.2, 4.1, 4.4. In executing the Agreement, the parties determined that this exchange constituted adequate consideration, and for

⁴ Connecticut and New York own some of the rail line that Amtrak uses, but in those States Amtrak also owns much of the rest of the line along which its trains run *and* provides the state commuter rail agency access to such track for commuter rail service.

the most part neither party is obligated to pay the other any monetary compensation in exchange for the access and services that each receives. Agreement §§ 3.1, 3.3.

II. The Commission's Unconstitutional Cost Sharing Policy

Five years after Amtrak and MBTA signed the Attleboro Line Agreement, and twenty-five years before the expiration of the Agreement's term, Congress enacted PRIIA. One purpose of PRIIA was to provide additional money to Amtrak for its maintenance and capital improvement needs on the Northeast Corridor, given the federal government's failure to provide Amtrak with consistent policy or financial commitments.

Section 212 of PRIIA established the Commission, a body consisting of representatives of Amtrak, the federal government, and Northeast Corridor States. 49 U.S.C. § 24905. While PRIIA directed the Secretary of Transportation to establish the Commission, *id.* § 24905(a)(1), the Secretary does not appoint all of the Commission's members. Instead, nine members (half of the Commission's 18 voting members) are "designated by, and serv[e] at the pleasure of" the chief executive officers of the States (including the District of Columbia) in the Northeast Corridor. *Id.* § 24905(a)(1)(C). In addition, four Commission members represent Amtrak, and five represent the U.S. Department of Transportation ("DOT"). *Id.* § 24905(a)(1)(A)-(B).

Through PRIIA, Congress tasked the Commission with, among other things, "develop[ing] a standardized policy for determining and allocating costs, revenues, and compensation for Northeast Corridor commuter rail passenger transportation . . . on the Northeast Corridor main line between Boston, Massachusetts, and Washington, District of Columbia," and certain branch lines. 49 U.S.C. § 24905(c)(1)(A). This formula is often referred to as the "Cost Sharing Policy," as it is intended to force the Northeast Corridor States to "share" in the costs previously incurred by Amtrak to maintain and further develop the Northeast Corridor rail line. Once the Cost Sharing Policy is finalized, PRIIA requires Amtrak and the

state commuter rail agencies to terminate their existing agreements and to “implement new agreements for usage or services based on the [Cost Sharing Policy].” 49 U.S.C. § 24905(c)(2).

PRIIA initially set up a procedure whereby, if the parties failed to enter new agreements, the Board would “determine the appropriate compensation amounts for such services in accordance with Section 24904(c) [now § 24903(c)] of this title” and “enforce its determination on the party or parties involved.” 122 Stat. 4923. In December of 2015, Congress amended the Board’s directive by passing the Fixing America’s Surface Transportation Act (the “FAST Act”), Pub. L. No. 114-94, 129 Stat. 1312 (2015). The FAST Act modified § 24905(c)(2) such that the Board is no longer instructed to determine compensation amounts by applying the substantive statutory criteria in § 24903. Instead, the FAST Act instructs the Board to look to § 24903 only for “procedures” and a “procedural schedule,” and to determine compensation by “taking into consideration the policy developed [by the Commission], as applicable.” FAST Act, § 11305(c)(3)(B)(ii), 129 Stat. 1657. Thus, as clarified by the FAST Act, the Commission’s Cost Sharing Policy is the Board’s rule of decision, and that is how Amtrak treats the Cost Sharing Policy in its petition against MBTA.

The Commission spent three years developing the Cost Sharing Policy and finally adopted an interim policy in December 2014. The Commission did not publish notice in the Federal Register with respect to the draft Policy or call for public comments. On September 17, 2015, the Commission adopted the final Cost Sharing Policy, by a 15 to 2 vote, with 1 abstention.⁵ See <http://www.nec-commission.com/wp-content/uploads/2016/06/Cost-Allocation->

⁵ The Commission members appointed by Massachusetts and New York voted against the Policy, and the member appointed by New Jersey abstained. The Policy, formally entitled the “Northeast Corridor Commuter and Intercity Rail Cost Allocation Policy,” was transmitted by the Commission to the STB under cover letter dated October 2, 2015.

Policy_v10.00_Cmsn-Amended-2016-Jun-15-Clean.pdf.⁶ The Policy was determined by a majority of representatives of the very entities it regulates, most of whom (unlike Massachusetts) do not own any of the track on which Amtrak trains run. The Policy results in clear “winners” and “losers” when applied against the variety of existing contracts between Amtrak and state commuter rail agencies. Using the Cost Sharing Policy rather than the existing contracts between Amtrak and state commuter rail agencies, Amtrak was expected to save about \$56 million in its fiscal year 2016, while Connecticut was expected to save about \$20 million and New York about \$16 million. The gains for Amtrak and those States are losses for others: New Jersey was expected to owe an estimated \$90 million, Massachusetts about \$29 million, and Pennsylvania approximately \$14 million.

III. Amtrak’s Demand for Tens of Millions of Dollars from MBTA, MBTA’s Filing of the District Court Litigation, and the Parties’ Attempts to Negotiate a Resolution.

In July of 2015, after the Commission adopted the interim Policy, Amtrak proposed that the Attleboro Line Agreement be “amended” to incorporate the Cost Sharing Policy. The proposed “amendments” would have gutted the Attleboro Line Agreement of the careful balance reached by the parties in 2003 and instead would have required all cost allocation to be determined pursuant to the Policy. Following adoption of the final Cost Sharing Policy, Amtrak demanded that MBTA pay it the cost allocation it calculated under the Policy—an alleged \$28.8 million for federal fiscal year 2016. The amount requested consisted of \$16.6 million for operating expenses (principally maintenance) and \$12.2 million for capital projects. Because MBTA has no obligation to pay those sums to Amtrak under the Attleboro Line Agreement, Amtrak’s demand simply shifts to MBTA costs that Amtrak is contractually obliged to bear.

⁶ The Cost Sharing Policy has been reissued on several occasions with various amendments. The current version was issued on June 15, 2016.

Following Amtrak's demand, the parties engaged in extensive discussions to resolve this dispute short of litigation. On January 27, 2016, when months of negotiations failed to result in a resolution, MBTA filed its complaint against Amtrak and the Commission in the District Court Litigation. MBTA's Complaint alleges that the relevant provisions of PRIIA and the FAST Act violate the U.S. Constitution, including the Appointments Clause, the Due Process Clause, and separation of powers principles. MBTA's Complaint also alleges that the Cost Sharing Policy was adopted in violation of the Administrative Procedure Act, that PRIIA and the FAST Act put Amtrak into breach of the Attleboro Line Agreement, *see United States v. Winstar Corp.*, 518 U.S. 839, 843 (1996), and that Amtrak breached the implied covenant of good faith and fair dealing in making its demand to MBTA for additional payments.

After MBTA filed its Complaint, Amtrak provided MBTA with notice that it was terminating the Attleboro Line Agreement on 12 months' notice, effective February 2017. Since MBTA's filing of the District Court Litigation, the two parties have been attempting to negotiate the terms of a new agreement to replace the Attleboro Line Agreement. MBTA agreed not to serve its Complaint on Amtrak or the Commission to allow breathing room for settlement discussions. After more than six months of negotiations, however, the parties were unable to reach a new agreement. MBTA therefore served its Complaint on Amtrak and the Commission on June 24, 2016.

That same day, Amtrak filed its petition with the Board. As noted, Amtrak relies entirely on 49 U.S.C. § 24905 to invoke the Board's jurisdiction—the same provision that MBTA is challenging in the District Court Litigation. Amtrak argues that the Board should “adopt the terms of the uniform policy” established by the Commission and order MBTA to pay

compensation based on the Commission’s formula. Amtrak Mem. in Support of Its Petition for Relief (“Amtrak Mem.”) at 15.

Contrary to Amtrak’s representation, the proceeding here would not “be a simple process” if it goes forward. Amtrak Mem. at 15. The parties are entitled to take discovery on issues related to compensation for track usage and services, which will likely include depositions and expert testimony related to the value and cost of track access, maintenance, and dispatching for the Attleboro Line. *See* 49 C.F.R. §§ 1114.21-1114.31. In particular, the parties will need to develop and present expert testimony concerning the value of dispatch rights and train priority on the Attleboro Line. MBTA is also entitled to develop evidence that Amtrak misapplied the Cost Sharing Policy to the Attleboro Line by, for example, asking MBTA to compensate it for services that MBTA, as the line and/or station owner, actually already provides. The discovery and adjudication process will accordingly be time and resource intensive and factually complex.

ARGUMENT

The Board holds proceedings in abeyance where “good cause” exists for doing so. *See, e.g., Bay Colony R.R. Corp.—Modified Rail Certificate*, Docket No. FD 29963 (STB served June 1, 2005) at 1 (holding Board proceeding in abeyance while parties attempted to reach a settlement of issues raised by the petition); *Delta Beverage Grp. Mfg. Co., Inc. v. Paris Motor Freight Inc.*, Docket No. 40352 (ICC served April 18, 1990) at 1 (good cause to grant request for abeyance where “litigation is pending between the parties in Federal district court concerning the propriety of this proceeding”). Good cause exists here because the District Court Litigation may obviate this proceeding entirely by eliminating the very statutory provision under which Amtrak claims a right to relief: 49 U.S.C. § 24905. *See, e.g., Consolidated R. Corp. – Abandonment Exemption – In Hudson Cty., NJ*, Docket No. AB-167 (Sub-No. 1189X), *et al.* (STB served April

20, 2010) at 2 (appropriate to suspend further action in agency proceeding where predicate issue is being addressed in District Court and “we will not reach a final decision until that issue is resolved.”); *Arizona Elec. Power Coop., Inc. v. BNSF Ry. Co.*, Docket No. 42113 (STB served April 23, 2009) at 3, 4 (“In the interests of administrative economy,” STB proceeding held in abeyance until court rules on underlying jurisdictional issue); *St. Louis Sw. Ry. Co.- Trackage Rights over Missouri Pac. R.R. Co.- Kansas City to St. Louis*, Docket No. FD 30000 (Sub-No. 16) (ICC served October 29, 1993) at 1 (“defer[ring] action on the issues raised in [petitioner’s] pleadings pending action by the District Court in the related case currently pending before it” because “[a]ny resolution we might make of the issues raised in [petitioner’s] pleadings might be inconsistent with the resolution of these issues by the District Court”).⁷

I. The District Court Litigation Challenges the Statutory Provisions Under Which Amtrak’s Petition Is Brought.

A. The District Court Litigation Asserts Three Independent Bases for Declaring 49 U.S.C. § 24905 Unconstitutional.

In the District Court Litigation, MBTA has alleged three independent bases for declaring § 24905 and the Cost Sharing Policy unconstitutional, any one of which would, if successful, invalidate the rule of decision that Amtrak asks this Board to apply. And there is good reason to believe MBTA’s federal action *will* be successful, as the D.C. Circuit Court of Appeals in the *AAR* case recently declared a similar provision in PRIIA to be unconstitutional based on two of the same grounds that MBTA raises in the District Court Litigation. By this petition, MBTA is not asking the Board to decide the merits of these constitutional claims pending in the District

⁷ See also *Brookhaven R. Terminal and Brookhaven R., LLC – Petition for Declaratory Order*, Docket No. FD 35819 (STB served August 28, 2014) at 4 (holding proceeding in abeyance while federal district court considered parallel issues); *Norco, Inc.-Petition for Declaratory Order*, Docket No. 41140 (ICC served February 18, 1994) at 1 (holding proceeding in abeyance while federal district court ruled on application of a relevant statutory defense).

Court Litigation, but the existence and strength of the claims is relevant to the Board's decision whether to hold this proceeding in abeyance.

First, § 24905 violates the Appointments Clause by granting significant regulatory authority to the Commission without requiring that the Commission's members be appointed by the President or the head of an Executive Department or court of law. The Appointments Clause requires "Officers" of the United States—those who exercise "significant authority," *Buckley v. Valeo*, 424 U.S. 1, 140-41 (1976)—to be appointed by the President (in the case of "principal Officers") or by the head of an Executive Department or court of law (in the case of "inferior Officers"). U.S. Const., art. II, §2, cl. 2. As the D.C. Circuit's decision in *AAR* makes clear, the Commission exercises "significant authority" because, by adopting the Cost Sharing Policy that is required to be implemented in new agreements and that is enforced by the Board, it exercises "coercive regulatory power." *AAR*, 821 F.3d at 34 (vesting in Amtrak and the Federal Railroad Administration ("FRA") the authority to jointly develop "performance metrics and standards" for on-time performance that Amtrak and host rail carriers "shall incorporate" into bilateral operating agreements and that are enforced by the Board constitutes a statutory grant of the "power to regulate"); *id.* at 37 (vesting in a Board-appointed arbitrator the "responsibility to render a final decision regarding the content of the metrics and standards" in the event Amtrak and the FRA could not reach agreement on the appropriate metrics and standards constitutes a statutory grant to the arbitrator of "significant authority pursuant to the laws of the United States" for purposes of the Appointments Clause).⁸

⁸ The D.C. Circuit notably rejected the Government's argument that Amtrak had not exercised regulatory power because the law supposedly did no more than encourage Amtrak and freight operators to incorporate the performance metrics and standards into their agreements "to the extent practicable"; the court reasoned that "ordinarily" in negotiation, "one party doesn't face statutory pressure to acquiesce in the other's demands 'to the extent practicable.'" 821 F.3d at 33. MBTA's argument here is even stronger than the appellants' in *AAR*, because 49 U.S.C. § 24905 *mandates* that Amtrak and state agencies incorporate the Cost Sharing Policy into new agreements, and not merely "to the extent practicable." 49 U.S.C. § 24905(c)(2).

The Cost Sharing Policy is not subject to review or revision by the Board, the Secretary of Transportation, or any other federal official. Just as PRIIA § 207 provides that Amtrak and host rail carriers “shall incorporate” the metrics and standards “into their operating agreements,” AAR, 821 F.3d at 24, PRIIA § 212 requires the same with respect to the Cost Sharing Policy. 49 U.S.C. § 24905. Furthermore, just as the “metrics and standards” established under PRIIA § 207 “lend definite regulatory force to an otherwise broad statutory mandate,” AAR, 821 F.3d at 33 (citation omitted), the Cost Sharing Policy is facially *the only criterion* that the Board is directed to consider when adjudicating disputes between Amtrak and the state commuter rail agencies. 49 U.S.C. § 24905(c)(2). Notwithstanding this grant of significant regulatory power to the Commission, none of the Commission’s members is required to be appointed by the President or the head of a federal department, and half are not appointed by any federal official at all but instead are appointed by the chief executives of States. 49 U.S.C. § 24905(a)(1). Consequently, § 24905 is unconstitutional, and the Cost Sharing Policy established by this unconstitutionally constituted body is invalid.⁹

Second, § 24905 violates separation of powers principles. The separation of powers requires that Officers be removable by, and thus accountable to, the President or the head of a Department in whom Congress may vest appointment power (in the case of inferior Officers). *See Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 493-97 (2010). Although, as noted above, § 24905 provides the Commission with executive authority (coercive regulatory power), nine members of the Commission are not removable by the President or any

⁹ As alleged in MBTA’s complaint in the District Court Litigation, because the Cost Sharing Policy is the result of an exercise of regulatory power, it also is invalid because it violates the Administrative Procedure Act (“APA”). The Commission is an agency of the federal government within the meaning of the APA, 5 U.S.C. § 551, and rules like the Cost Sharing Policy that have legal consequences must be adopted through notice and comment rulemaking, *id.* § 553. The Commission did not, however, follow the APA’s notice and comment requirements in adopting the Cost Sharing Policy. Because the Cost Sharing Policy was adopted “without observance of procedure required by law,” 5 U.S.C. § 706(2)(D), it must be set aside and may not be enforced against MBTA.

other member of the federal Executive Branch, whether for good cause or otherwise. Instead, they serve “at the pleasure” of the State chief executive who appointed them to the Commission. 49 U.S.C. § 24905(a)(1)(C). By conferring Commission members with executive authority while insulating them from any accountability to the Executive Branch, § 24905 violates the separation of powers.

Third, § 24905 violates the Due Process Clause. Due process requires that the substantive rules that govern the behavior of market participants be determined by regulators who are neutral and disinterested. *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *AAR*, 821 F.3d at 29 (“Delegating legislative authority to official bodies is inoffensive because we presume those bodies are disinterested, that their loyalties lie with the public good, not their private gain.”). The D.C. Circuit applied this principle to PRIIA § 207 in *AAR*, holding that § 207 violated the Due Process Clause by endowing Amtrak with “regulatory authority over its competitors” by vesting it with the power to develop metrics and standards along with the FRA. *AAR*, 821 F.3d at 34. As the court explained, Amtrak is not a neutral and disinterested entity because it is a “for profit corporation” charged with “undertak[ing] initiatives . . . designed to maximize its revenues and minimize Government subsidies,” *id.* at 24 (quoting 49 U.S.C. §§ 24301(a)(2), 24101(d)), and it acted out of self-interest in developing new performance metrics and standards, which “will inevitably boost Amtrak’s profitability at the expense of its competitors,” *id.* at 34. That violates the Due Process Clause.

The same is true here. Nearly every member of the Commission is self-interested in the Cost Sharing Policy, which will determine how tens of millions of dollars will flow in newly-imposed agreements between—or Board orders enforced against—Amtrak and state commuter rail agencies. As with the metrics and standards at issue in *AAR*, the divergent interests of the

market participants who compose the Commission “transform[ed] the development of [the Cost Sharing Policy] into an unfair game of zero sums,” where some members, including Massachusetts, lose tens of millions of dollars in the new contracts they are forced with other Commission members. *AAR*, 821 F.3d at 34. As the court held in *AAR*, Amtrak and the state commuter rail agencies “may *either* compete, as market participants, *or* regulate, as official bodies,” but “[t]o do both is an affront to ‘the very nature of things,’ especially due process.” *Id.* at 36.

B. This Agency’s Consistent and Long-Standing Practice Is to Decline to Reach the Types of Constitutional Issues that Are Central to this Dispute.

As discussed above, the District Court Litigation could obviate this proceeding altogether by invalidating the statutory provision and Cost Sharing Policy that Amtrak asks the Board to apply in this action. The Board should hold this action in abeyance because, as the Board has stated time and again, the constitutional challenges that MBTA asserts in the District Court Litigation and would assert as defenses in this proceeding will be decided *only* by a federal court. *See, e.g., Amtrak – Conveyance of B&M in Conn. River Line in VT & NH*, 4 I.C.C.2d 761, 771 (1988) (“*Amtrak/B&M*”) (“[I]t is not within the Commission’s province to determine whether a particular statute is unconstitutional. Our function is to interpret the law as it is enacted and to enforce it as intended by Congress. We will therefore refrain from addressing B&M’s constitutional arguments.”), *rev’d on other grounds sub nom. Boston & Maine Corp. v. ICC*, 911 F.2d 743 (D.C. Cir. 1990), *rev’d*, 503 U.S. 407 (1992); *accord South-West R.R. Car Parts Co. v. Missouri Pac. R. Co.*, Docket No. 40073 (ICC served July 10, 1987) at 8 n.9 (“[I]t is not within the Commission’s province to determine whether a particular statute is unconstitutional on its face.”); *San Antonio, TX v. Burlington Northern, Inc.*, 1 I.C.C.2d 561, 567 (1986) (same).

Thus, this is not a case in which the pertinent issues presented by the parties can be decided in parallel, by both the Board and a federal court. *Contra Dura Glob. Techs., LLC v. Magna Int'l Inc.*, No. 11-CV-10551-SFC-MKM, 2011 WL 5039883, at *6 (E.D. Mich. Oct. 24, 2011) (“There is nothing wrong with having parallel or concurrent district court [patent] litigation and ex parte [agency] reexamination proceedings . . .”). The Board repeatedly has urged respondents to seek redress from federal district courts in mounting constitutional challenges. *See, e.g., South-West R.R. Car Parts* at 8 n.9 (“[I]f complainant wishes to challenge the constitutionality of our rate reasonableness authority, SWRC should bring an action in an appropriate district court.”); *San Antonio*, 1 I.C.C.2d at 567 (“If defendants wish to challenge the constitutionality of section 203(c), they should bring an action in an appropriate district court.”); *Amtrak/B&M*, 4 I.C.C.2d at 771 (“If any party wishes to challenge the constitutionality of section 402(d) of RPSA, they should bring an action in an appropriate district court.”). That is precisely what MBTA did here, five months before Amtrak filed its petition. Holding this action in abeyance so the district court can reach these issues is both the efficient solution and consistent with the Board’s past admonitions.

II. The District Court Litigation Involves an Additional Claim that, if Successful, Will Foreclose Amtrak’s Request for Relief from the Board “Retroactive to October 1, 2015.”

Amtrak’s petition requests that the Board determine future compensation in accordance with the Cost Sharing Policy, and apply that determination “retroactive to October 1, 2015,” the effective date of the Cost Sharing Policy. Amtrak Pet. 2. But the District Court Litigation asserts a breach of contract claim that would nullify any relief effective before February 2017, when Amtrak’s recent termination of the Attleboro Line Agreement on 12 months’ notice becomes effective. The Supreme Court has squarely held that statutory enactments like PRIIA and the FAST Act cannot excuse the Government from its contractual obligations. *United States*

v. Winstar, 518 U.S. 839, 843 (1996). To be sure, *Winstar* does not prevent Congress from breaching Amtrak’s contract with MBTA through legislative enactment. But doing so would mean that *Amtrak* is liable *to MBTA* for breach of contract; it would not permit Amtrak to recover nearly \$30 million per year *from MBTA* for the time that will elapse between the Cost Sharing Policy’s effective date and February 2017. *See id.* at 870 (“When the law as to capital requirements changed in the present instance, the Government was unable to perform its promise and, therefore, became liable for breach.”). The District Court Litigation thus provides yet another reason why the Board should hold these proceedings in abeyance pending the District Court’s resolution of MBTA’s Complaint, so as to not waste time and resources deciding how the Policy should be applied to periods before February 2017.

III. Absent § 24905, There Is No Other Statutory Basis for the Relief Amtrak Seeks.

Holding this action in abeyance is particularly appropriate in this case because Amtrak’s petition includes no basis for the relief it seeks other than the unconstitutional § 24905. That is no accident, for there is no other provision of Title 49 that authorizes the Board to award Amtrak compensation from MBTA. In the absence of bilateral agreements between Amtrak and state commuter rail agencies, federal law requires Amtrak to provide access to track it owns to state commuter rail agencies, 49 U.S.C. § 24903 (renumbered from § 24904 under the FAST Act), and likewise requires state commuter rail agencies to provide access to rail lines they own to Amtrak, *id.* § 24308. In both instances, if Amtrak and the relevant state commuter rail agency cannot agree on the compensation to be provided for such access and related services, then the Board would decide the amount of compensation to be paid *to the rail owner*—here, MBTA—by the party obtaining rail access—here, Amtrak—based on criteria specified in the relevant statutory provision. *See id.* § 24308(a)(2)(A); *id.* § 24903(c)(2). There is no provision, however,

authorizing the Board to enter a net award of costs *against the rail owner* with respect to services provided *by the accessing carrier*; the allocation of such costs is purely a question of contract.

Because Amtrak neither seeks nor has a right to relief from MBTA absent the application of § 24905 and the Cost Sharing Policy, the Board cannot enter an order in Amtrak's favor that avoids the constitutional infirmities with § 24905 that MBTA has raised in the District Court Litigation. Thus, proceeding with this action in the face of MBTA's constitutional challenges necessarily creates an unnecessary risk that this Board's and the parties' resources will be wholly wasted should § 24905 be struck down.

IV. Additional Prudential Reasons Weigh in Favor of a Stay.

An abeyance is not only warranted because pending District Court Litigation could result in § 24905 being declared unconstitutional; additional considerations reinforce the propriety of an abeyance.

First, as Amtrak observes in its petition, additional state commuter rail agencies (Amtrak identifies Connecticut, Maryland, New Jersey, New York, and Rhode Island) have resisted Amtrak's efforts to force the Commission's Cost Sharing Policy upon them and have not yet reached agreements with Amtrak as § 24905 directs. Amtrak Mem. at 1 n.2. Amtrak has already stated that if it is unable to reach new agreements with these entities, it may amend its petition to bring these agencies in as additional respondents. *Id.* If it were to do so, the potential waste of resources in this proceeding, should the District Court Litigation result in a determination that § 24905 is unconstitutional, only would be magnified.

Second, MBTA filed the District Court Litigation five months before Amtrak filed this agency action, and the only reason the District Court Litigation had been generally inactive until recently is that MBTA agreed not to serve its Complaint so that the parties could negotiate a potential settlement. Permitting Amtrak to jump ahead of the District Court Litigation by filing

this Petition on the same day that MBTA served the District Court Complaint would be inequitable and inconsistent with filing priority principles followed by many tribunals. *See, e.g., Intervet, Inc. v. Merial Ltd.*, 535 F. Supp. 2d 112, 114 (D.D.C. 2008) (“The first-to-file rule dictates that when two actions involving the same subject matter are pending, the first-filed action should proceed to the exclusion of the later-filed action.”).

Third, the parties continue to attempt to resolve this dispute amicably and MBTA remains hopeful that a final resolution may be reached. It would be inefficient for the Board to delve into a fact-intensive rate dispute on the accelerated schedule applicable to Board adjudicatory proceedings, which will include expert discovery and testimony, in light of these ongoing settlement discussions.

CONCLUSION

In light of the foregoing, MBTA respectfully asks that the Board hold these proceedings in abeyance pending the district court’s resolution of the District Court Litigation.

DATED: August 2, 2016

Respectfully submitted,

MASSACHUSETTS BAY
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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of August, 2016, a copy of the foregoing PETITION TO HOLD PROCEEDING IN ABEYANCE PENDING PARALLEL DISTRICT COURT LITIGATION was served via e-mail, as agreed upon by the Parties, upon the following:

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